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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

THE STATE OF VERMONT; CUTTING & TRIMMING, INC.; CHITTENDEN TRUST COMPANY OF BURLINGTON; RAINBOW CHILDREN'S DRESS COMPANY OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in the above-entitled case.

OPINIONS BELOW

The opinion of the district court (R. 22–30) is reported at 206 F. Supp. 951. The opinion of the court of appeals (Appendix A, *infra*, pp. 14–30) is reported at 317 F. 2d 446.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1963 (App. A, *infra*, p. 31). On July 3, 1963, the court of appeals (1) granted the government's motion for leave to file an untimely petition

for rehearing, and (2) denied the petition (App. A, *infra*, pp. 32–33; see note 1, *infra*, p. 4).

QUESTION PRESENTED

Whether the standards which this Court has developed for determining whether a state-created lien is sufficiently perfected so that it has priority over a federal tax lien are applicable for deciding the priority of a state tax lien asserted against a non-insolvent taxpayer.

STATUTES INVOLVED

The pertinent provisions of the Internal Revenue Code of 1954 and the Vermont Statutes Annotated are set forth in Appendix B, *infra*, pp. 34–35.

STATEMENT

On October 21, 1958, the State of Vermont made an assessment and demand on Cutting & Trimming, Inc. for state income taxes of $1,628.15 which the company had withheld from wages paid to its employees. The pertinent Vermont statute (32 V.S.A. Section 5765, App. B, *infra*, p. 35) provides that if an employer who is required to deduct and withhold a tax from an employee's wages fails to pay the same after demand, "the amount, including interest after such demand, together with any costs that may accrue in addition thereto, shall be a lien in favor of the state of Vermont upon all property and rights to property, whether real or personal, belonging to such employer," and further that "Such lien shall arise at the time the assessment and demand is made by the commissioner of taxes and shall continue until the liability for such sum, with interest and costs, is satisfied or becomes unenforceable."

On May 21, 1959, the State instituted suit in a state court against Cutting & Trimming and Chittenden Trust Company, a Vermont bank in which Cutting & Trimming had $1,878.82 on deposit, of which $600 had already been attached by Rainbow Children's Dress Company. On October 23, 1959, the state court entered judgment for Vermont against Cutting & Trimming for $4,049.22 (which included other tax assessments not here relevant), and against Chittenden Trust Company for $1,278.82 (App. A, *infra*, pp. 15–16).

Prior to the filing of the state court suit—but subsequent to the State's assessment and demand—the Commissioner of Internal Revenue on February 6, 1959, made an assessment of $5,365.96 against Cutting & Trimming for 1958 taxes under the Federal Unemployment Tax Act. In 1961, the United States brought the present action against Cutting & Trimming, the State of Vermont, and others, to establish Cutting & Trimming's tax liability, and to foreclose its tax lien against the property of Cutting & Trimming held by the trust company. The answer of the State of Vermont alleged that the October 21, 1958, assessment gave its lien priority over the federal lien. On cross-motions for judgment on the pleadings, the district court held that the State of Vermont's tax lien had priority over the federal lien, and directed the trust company to apply the $1,878.82 first to the payment of principal and interest on the State's tax lien, and to pay any balance to the United States. (App. A, *infra*, p. 16).

The court of appeals affirmed. The court ruled that under the standards which this Court has applied for determining the relative priority of federal and state tax liens under Section 3466 of the Revised Statutes (now 31 U.S.C. 191) where the taxpayer is insolvent, the general lien of the State of Vermont upon all the taxpayer's property was not sufficiently perfected to prevail over the federal lien (App. A, *infra*, p. 18); that a different standard for determining whether the state lien is perfected applies, however, when the federal priority is asserted under the lien provisions of the Internal Revenue Code against a non-insolvent taxpayer (*id.*, pp. 18–30); and that under this Court's decision in *United States* v. *New Britain*, 347 U.S. 81, "[i]t would seem that if the general federal tax lien under §§ 6321 and 6322 is thus sufficiently 'choate' to prevail over a later specific local tax lien, a general state tax lien under an almost identically worded statute must also be 'choate' enough to prime a later and equally general federal tax lien under Chief Justice Marshall's 'cardinal rule' of 'first in time, first in right', in the absence of contrary direction by Congress" (*id.*, at 25).

REASONS FOR GRANTING THE WRIT[1]

The court of appeals, in denying the federal tax lien priority over the tax liens of the State of Vermont, has decided an important question of federal

[1] The petition in this case is timely. "The filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a petition out of time, if not acted on or if denied by the trial

law in a way that misapplies the decisions of this Court, and in conflict with a decision of the Supreme Court of Washington.

1. This Court has repeatedly held that a State-created lien does not have priority over a subsequent federal tax lien unless, at the time the federal tax lien attached, the state lien was already perfected or "choate." This doctrine was originally developed in cases which held that a general state tax lien upon all of a taxpayer's property was not sufficiently perfected to defeat the priority which Section 3466 of the Revised Statutes gave in cases of insolvency to all debts due to the United States (including taxes). *Spokane County* v. *United States*, 279 U.S. 80; *New York* v. *Maclay*, 288 U.S. 290; *United States* v. *Texas*, 314 U.S. 480; *Illinois* v. *Campbell*, 329 U.S. 362. In *United States* v. *Security Trust and Savings Bank*, 340 U.S. 47, the principle was applied to determine

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court, cannot operate to extend the time for appeal. But where the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof." *Bowman* v. *Loperena*, 311 U.S. 262, 266 (footnote omitted); see, also, *Federal Trade Commission* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, 211.

The present case comes squarely within the foregoing principles. Following the entry of the court of appeals' judgment on May 9, 1963, the government filed a motion for leave to file an untimely petition for rehearing, in which it called attention to this Court's intervening decision in *United States* v. *Pioneer American Insurance Co.*, 374 U.S. 84. The court of appeals granted leave to file the petition, but denied it on the merits. App. A, *infra*, pp. 32–33. The petition for certiorari is being filed within 90 days of such denial of rehearing on July 3, 1963.

the priority of a federal tax lien under the general lien provisions of the Internal Revenue Code. The Court there pointed out (p. 51) that in cases under the "kindred matter" of the insolvency statute (Section 3466) "it has never been held sufficient to defeat the federal priority merely to show a lien effective to protect the lienor against others than the Government, but contingent upon taking subsequent steps for enforcing it"; and it concluded (*ibid.*) that "[i]f the purpose of the federal tax lien statute to insure prompt and certain collection of taxes due the United States from tax delinquents is to be fulfilled, a similar rule must prevail here." The Court therefore held that a federal tax lien was superior to an attachment lien which had attached prior to the federal lien but subsequent to the time the attaching creditor obtained judgment.

Since that decision, this Court repeatedly has applied the principle, reiterated last Term in *United States* v. *Pioneer American Insurance Co.*, 374 U.S. 84, 88, that only "[c]hoate state-created liens take priority over later federal tax liens."

A state lien is not choate as against the federal lien, however, unless and until three conditions have been satisfied: "when [1] the identity of the lienor, [2] the property subject to the lien, and [3] the amount of the lien are established." *United States* v. *New Britain*, 347 U.S. 81, 84, quoted with approval in *Pioneer, supra*, at 89. The second requirement for choateness—the establishment of "the property subject to the lien"—requires that "[t]he lien must attach to specific property of the debtor." *Illinois*

v. *Campbell*, 329 U.S. 362, 373. In the *Campbell* case a state tax lien upon all of a taxpayer's property was held to be "not so specific and perfected as to defeat the priority of [the tax claim of] the United States" under Section 3466 of the Revised Statutes, even though the state had already secured the appointment of a receiver of the insolvent taxpayer's property at the time the federal lien attached. See, also, *United States* v. *New Britain*, 347 U.S. 81, 84, 86–87 (emphasis added) where the Court, in a non-insolvency case, "accept[ed] the holding [of the state court] as to the specificity of the City's liens *since they attached to specific pieces of real property* for the taxes assessed and water rent due"; and held that such liens had priority over the federal tax liens under the rule of first-in-time, first-in-right, since they "apparently *attached to the specific property and became choate* prior to the attachment of the federal tax liens."

The court of appeals in the present case correctly ruled that under the foregoing authorities the federal tax lien would have had priority over the Vermont lien if the case had arisen under Section 3466. While the Vermont lien came into being when the State assessed and demanded the tax—which was prior to the federal tax lien—the State's lien was not then perfected because it did not attach to specific property of Cutting & Trimming, but was only a general lien upon all of that company's property. Although the State of Vermont subsequently took steps to perfect its lien by attaching the bank account in question,

such suit was not instituted until after the federal tax lien had arisen and had been recorded. The State lien therefore did not meet one of the three essential elements of a choate lien; that it attach to specific property.

The court of appeals concluded, however, that a different rule governs the priority of state and federal tax liens where, as here, the federal priority rests upon the lien provisions of the Internal Revenue Code rather than upon Section 3466 of the Revised Statutes. It reasoned that if, as *New Britain* teaches, the federal lien upon all of a taxpaper's property is "perfected in the sense that there is nothing more to be done to have a choate lien" (347 U.S. at 84), a state tax lien upon all of a taxpayer's property is similarly perfected. This conclusion, we submit, fails to give appropriate weight to the underlying rationale of the decisions of this Court in which the choateness test was developed, and to the basic Congressional policy of protecting federal revenues which that doctrine is designed to implement.

In the first case under the insolvency statute in which the choateness doctrine was applied (*Spokane County* v. *United States*, 279 U.S. 80), the question was whether state taxes assessed against an insolvent prior to the appointment of a receiver, and which under state law constituted a lien upon all the taxpayer's property, had priority over taxes due to the United States, but not yet assessed. The State contended that the priority which Section 3466 gave to debts due to the United States did not apply as against a secured claimant (see 279 U.S. at 81). The

Court found it unnecessary to decide this question, however. It ruled that since the State had not taken the necessary statutory steps to perfect its assessment lien (*i.e.*, "seizure, distraint or other specific proceedings," 279 U.S. at 93–94), its claim was merely that of an unsecured creditor; and that the federal debts had priority over such unsecured claims under Section 3466. The Court quoted with approval the following statement of the concurring judge in the state court: "[N]either the United States, the state of Washington nor Spokane County for the state of Washington has ever, by the prescribed statutory procedure, perfected its inchoate tax lien right against any of the property of which the funds here in question are the proceeds" (279 U.S. at 94).

Four years later, in *New York* v. *Maclay*, 288 U.S. 290, the Court again found it unnecessary to decide whether "a perfected lien upon the property of the insolvent at the date of the receivership" would have priority under Section 3466 over a federal claim for taxes, since it again held that a State's tax liens were "not so perfected or specific as to change the rule of distribution" (288 U.S. at 292). In *United States* v. *Texas*, 314 U.S. 480, and *Illinois* v. *Campbell*, 329 U.S. 362, the Court similarly held that the mere assessment of State taxes without the taking of further steps to perfect the liens, did not create a sufficient perfected local lien to require resolution of the question whether a choate state lien would defeat the federal priority in insolvency. And, as noted above, the reason why the general local liens were held not perfected in *Campbell* was because they had not "at-

tach[ed] to specific property of the debtor" (329 U.S. at 373).

In sum, the rationale of the cases in which the choateness test was developed was that a general local lien upon all of a taxpayer's property, although valid against other State-created interests, was not valid against the claims of the federal government. As against such claims, which were given priority by the insolvency statute, the state lien was ineffective to give the State any position other than that of a general unsecured creditor. It is difficult to see why the result should be any different where the federal claim to priority rests upon the tax lien statute rather than upon the insolvency statute. Indeed, it would seem anomalous if a general state lien was viewed as not sufficiently perfected to have priority over an *unsecured* federal debt (which was the status of the tax claims involved in the insolvency cases) but nevertheless was sufficiently perfected to prevail over a *secured* tax claim. It is therefore not surprising that, when this Court faced the question in the *Security Trust* case, *supra*, it held that the choateness test enunciated in the insolvency cases was also applicable in cases arising under the lien provisions of the Internal Revenue Code—a view which it has since followed.

Admittedly, at first glance it may seem anomalous to say that a federal tax lien upon all a taxpayer's property is, without more, choate, but that a general state tax lien, framed in the same terms, is inchoate because it has not yet attached to specific property. This seeming anomaly, however, reflects only the fact

that Congress, in order to accomplish "the purpose of the federal tax lien statute to insure prompt and certain collection of taxes due the United States from tax delinquents" (*Security Trust, supra,* 340 U.S. at 51), has given the federal tax lien a priority which State tax liens do not enjoy.[2] As this Court recognized in *New Britain,* the federal lien, although general, is perfected. A comparable State lien, however, is not perfected so as to prevail over the federal lien unless it satisfies the criteria of choateness, one of which is that it must have attached to specific property before the federal lien came into existence. The Vermont lien involved in the present case had not so attached, and it therefore is subordinate to the federal lien.

2. The decision below is in conflict with the decision of the Washington Supreme Court in *Weitz* v. *Electrovation, Inc.,* 48 Wash. 2d 604, 295 P. 2d 728. In that case, the Washington Supreme Court had to determine whether the State's tax and other liens, which attached to all of the taxpayer's property upon assessment, had priority over federal tax liens asserted

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[2] Cf. *United States* v. *Bradley,* decided August 8, 1963, — F. 2d —, 1963-2 U.S.T.C., par. 9657, in which the Fifth Circuit held that in bankruptcy the choate lien test is not applicable to state tax liens because Section 64(a) of the Bankruptcy Act (11 U.S.C. 104(a)) accords parity to unsecured federal, state and local tax claims, and Section 67(b) of the Bankruptcy Act (11 U.S.C. 107(b)) validates federal and state tax liens arising or perfected while the debtor is insolvent. The court accordingly held that general tax liens for Mississippi state sales taxes and county personal property taxes which had not yet attached to any specific property of the taxpayer were superior to later-assessed federal taxes, and entitled to prior payment in bankruptcy.

under the Internal Revenue Code. The court referred to a prior decision in which it "held that the lien which the state acquires upon the property of a taxpayer for unpaid occupation taxes through the filing of warrants is only an inchoate, general lien, which can become specific only by distraint or levy of execution" (48 Wash. 2d at 609, 295 P. 2d at 731); and it held that since the state liens had not "become specific and perfected prior to the effective date of the Federal liens" (48 Wash. 2d at 610, 295 P. 2d at 732), the latter had priority.

The Washington court of appeals thus specifically held in the *Weitz* case that a general state tax lien upon all of the taxpayer's property was not sufficiently "specific and perfected" to defeat a similar federal tax lien asserted under the Internal Revenue Code. The court of appeals in the present case, however, has held that a comparable general state tax lien does have priority over the federal lien.

3. The question is an important one in the administration of the internal revenue laws which this Court should decide. Many states and their subdivisions give local governments a lien on all of a taxpayer's property for unpaid taxes upon assessment and demand, or when the taxes become payable.[3] The decision below, if allowed to stand, will

[3] See, *e.g.*, in addition to the state tax statutes involved in the *Campbell* and *Maclay* cases, *supra*, which are still in force (Smith-Hurd Illinois Annotated Statutes, c. 48, Sec. 243; McKinney's Consolidated Laws of New York Annotated, Book 59, Sec. 197), Iowa Code Annotated, Sec. 422.26, which provides with respect to income, corporation and sales taxes that the amount of the tax "shall be a lien in favor of the state upon

understandably have a significant impact upon the application of such statutes to property against which both the federal government and the states claim priority for their tax liens. At a minimum, the decision is almost certain to produce a substantial volume of litigation in other courts. Review by this Court is therefore appropriate.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1963.

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all property and rights to property, whether real or personal, belonging to said taxpayer"; Tennessee Code Annotated, Vol. 12, Sec. 67-2928, which provides for a franchise tax lien "upon all the property of such taxpayer against whom the same is assessed." Both New Jersey and Pennsylvania provide that all state taxes imposed on corporations constitute a lien upon all the corporation's property. See New Jersey Statutes Annotated, Title 54, Sec. 10A-16; Purdon's Penna. Statutes Annotated, Title 72, Sec. 3342.

APPENDIX A

United States Court of Appeals for the Second Circuit

No. 272

OCTOBER TERM, 1962

UNITED STATES OF AMERICA, APPELLANT

v.

THE STATE OF VERMONT; CUTTING & TRIMMING, INC.; CHITTENDEN TRUST COMPANY OF BURLINGTON; RAINBOW CHILDREN'S DRESS COMPANY OF NEW YORK, APPELLEES

Argued April 11, 1963. Decided May 9, 1963

Docket No. 27779

Before: MOORE, FRIENDLY and HAYS, *Circuit Judges.*

FRIENDLY, *Circuit Judge:*

This case raises a question in the vexed field of federal tax lien priority not squarely ruled by any of the numerous decisions of the Supreme Court. It involves a conflict between a state tax assessment, definite in amount, which became a lien on all of a taxpayer's property but did not relate to specific assets, and a later federal tax assessment with precisely the same attributes, in a situation to which the federal priority-in-insolvency statute, R.S. § 3466, now codified in 31 U.S.C. § 191, is not in terms ap-

plicable. The District Court for Vermont upheld the priority of the state tax lien, 206 F. Supp. 951. We agree.

The circumstances giving rise to the controversy are these:

The Vermont statutes provide, 32 V.S.A. § 5765, that if an employer who is required to deduct and withhold a tax from an employee's wages fails to pay the same after demand, "the amount, including interest after such demand, together with any costs that may accrue in addition thereto, shall be a lien in favor of the state of Vermont upon all property and rights to property, whether real or personal, belonging to such employer," and further that "Such lien shall arise at the time the assessment and demand is made by the commissioner of taxes and shall continue until the liability for such sum, with interest and costs, is satisfied or becomes unenforceable." The lien becomes valid "as against any subsequent mortgagee, pledgee, purchaser or judgment creditor" once notice is filed with the clerk of the town, city or, in some instances, county where the property is situated. On October 21, 1958, Vermont made an assessment and demand on Cutting & Trimming, Inc. for $1,628.15 for withholding taxes due for the third quarter of 1958; it filed notice of lien on October 30 with the city clerk of Burlington. On May 21, 1959, it instituted suit in a state court against Cutting & Trimming, Inc., and joined Chittenden Trust Co., a Burlington bank, as a defendant. In consequence of a writ served on May 25, Chittenden Trust Co. disclosed that it had in hand $1,278.82 owing to Cutting & Trimming plus another $600 previously attached by Rainbow Children's Dress Company. On October 23, 1959, judgment was entered for Vermont against Cutting & Trimming for $4,049.22—this including other assess-

ments not here relevant—and against Chittenden Trust Co. for $1,278.82.

Meanwhile, on February 9, 1959, the Commissioner of Internal Revenue made an assessment of $5,365.96 against Cutting & Trimming for 1958 taxes under the Federal Unemployment Tax Act. Under §§ 6321 and 6322 of the Internal Revenue Code of 1954, this amount thereupon became "a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." On June 2, 1959, notice of lien was filed pursuant to § 6323 of the Code.

Later, in 1961, the United States brought this action against Cutting & Trimming, Chittenden Trust Co., the State of Vermont, and Rainbow Children's Dress Company, to establish the indebtedness of Cutting & Trimming for taxes in a larger amount than the February 9, 1959, assessment, and to foreclose its lien against the property of Cutting & Trimming held by the trust company ahead of Vermont's lien. Vermont's answer alleged that its lien had priority as a result of the October 21, 1958, assessment.[1] On cross-motions for judgment on the pleadings, the District Court decreed that Chittenden Trust Co. apply the $1,878.52 held by it first to the principal and then to the interest of Vermont's lien, with any balance payable to the United States, and directed, under F.R. Civ. Proc. 54(b), that this be a final judgment as to the trust company and the state.

In defending against the appeal of the United States from this judgment, Vermont relies on the

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[1] Vermont does not, and could not, rely on its status as a judgment creditor under the October 23, 1959, judgment in the state court, since notice of the federal lien had been filed prior to that time. See 26 U.S.C. § 6323 (§ 3672 of Internal Revenue Code of 1939).

principle that, at least as between liens of the same sort, the first in time is the first in right. It emphasizes that its lien, which predated the federal lien, was in every other material respect identical to it. The state lien, like the federal, attaches to "all property and rights to property, whether real or personal, belonging to" the taxpayer, arises "at the time the assessment * * * is made," and is valid once notice has been filed as against any subsequent "mortgagee, pledgee, purchaser, or judgment creditor." 32 V.S.A. § 5765; 26 U.S.C. §§ 6321–6323. The *verbatim* similarity is not a coincidence; as Judge Gibson pointed out, 206 F. Supp. at 956, the Vermont legislation was avowedly modeled on the Internal Revenue Code. Enforcement also is similar; Vermont, like the federal government, could have enforced its lien on the fund here at issue either by a civil action in the courts or by direct seizure and public sale.[2] Against this the United States argues that the first in time principle is inapplicable because (1) decisions of the Supreme Court have established that the federal lien would prime Vermont's if Cutting & Trimming had been insolvent so that the federal priority-in-insolvency statute, 31 U.S.C. § 191 (former R.S. § 3466), would have come into play, and (2) the same principle should be—or at any rate has been—applied when the Government relies only on the tax lien statutes, §§ 6321–23 of the Internal Revenue Code.

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[2] Section 7403 of the Internal Revenue Code provides for enforcement of a federal tax lien by civil action; §§ 6331–6344 provide for seizure and sale. Although Judge Gibson did not fully develop the statutory basis for his statement that public sale as well as civil action would be an available means of enforcing Vermont's lien, 206 F. Supp. at 953, see also 955, the proposition seems entirely sound. In 1958, when this case arose, the controlling provision was 32 V.S.A. § 5767, which states that "The lien provided for by section 5765 of this title may

The Government's first proposition is beyond successful challenge. In cases governed by R.S. § 3466, the Supreme Court has upheld the priority of United States tax claims against an Illinois tax lien, arising prior to the Government's, which we find indistinguishable from Vermont's here, *Illinois* v. *Campbell*, 329 U.S. 362, 370–76 (1946), and even against an antecedent lien for state property taxes assessed upon certain machinery owned by the taxpayer, *United States* v. *Gilbert Associates, Inc.*, 345 U.S. 361 (1953). It is the Government's second proposition that is debatable.

Considering the two statutes solely on the basis of their language and purpose, we find nothing that calls for identical results and much that leads to different ones. R.S. § 3466, which goes back to 1796, 1 Stat. 515, says, in the strongest possible terms, that "Whenever any person indebted to the United States is insolvent * * * debts due to the United States shall

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be foreclosed in the case of real estate agreeably with the provisions of law relating to foreclosure of mortgages on real estate, and in the case of personal property, agreeably with the provisions of law relating to the foreclosure of chattel mortgages." While the provisions relating to foreclosure of mortgages on real estate apparently allow this to be done only by bill or petition in equity, see 12 V.S.A. §§ 4521 *et seq.*, chattel mortgages can be foreclosed as well by direct public sale, 9 V.S.A. §§ 1793–1797; hence that remedy would have been available here as to the money held by the bank.

In 1959 Vermont strengthened these provisions by enacting 32 V.S.A. § 5763, which makes applicable to the employers' withholding tax here involved "the provisions * * * of chapter 155 of this title." Those provisions include 32 V.S.A. § 6067, which provides that "When a tax * * * is not paid within sixty days after the same becomes due, the commissioner shall issue a warrant * * * to the sheriff * * * commanding him to levy upon and sell the real and personal property of the taxpayer * * *."

be first satisfied." In cases to which it applies, it gives this prime position to all "debts due to the United States," whether liens or not; the only issue in such cases is how far the words of the statute should be restricted by withdrawing from their sweep property of the insolvent upon which a rival claimant has secured a "lien".[3] It is in this connection that the Supreme Court has developed the rule that a lien contesting against the priority of the United States cannot escape the literal impact of R.S. §3466 unless at "the crucial time" it was "definite, and not merely ascertainable in the future by taking further steps," as to the identity of the lien or; the amount of the lien, and the property to which it attaches, *Illinois* v. *Campbell, supra,* 329 U.S. at 375; whether a lien passing even this severe test will in fact escape the breadth of R.S. § 3466, the Court has not decided. *Spokane County* v. *United States,* 279 U.S. 80 (1929); *New York* v. *Maclay,* 288 U.S. 290 (1933); *United States* v. *Texas,* 314 U.S. 480 (1941); *United States* v. *Waddill, Holland & Flinn, Inc.,* 323 U.S. 353 (1945); *Illinois* v. *Campbell, supra; United States* v. *Gilbert Associates, Inc., supra;* see Kennedy, *The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien,* 63 Yale L.J., 905, 911–19 (1954). In contrast, the federal tax lien statutes, which trace their ancestry to 1865, 13 Stat. 470–71, and were re-enacted for the first time in 1866, 14 Stat. 107, have remained silent for nearly a century on the very issue as to which R.S. § 3466 has spoken so clearly, since the earliest

[3] If the rival claimant has attained the status of "mortgagee, pledgee, purchaser, or judgment creditor," he then prevails, under 26 U.S.C. § 6323 (formerly § 3672 of the 1939 Code), against even an antecedent federal tax lien, if notice thereof has not been previously filed.

days; they say nothing to create a priority for tax liens of the United States over similar but earlier tax liens of the states or municipalities. This silence of the law-makers of 1865–66 becomes more eloquent when the language of the tax lien statutes is contrasted with the Bankruptcy Act of 1867, 14 Stat. 517, 531, passed by the same Congress that had re-enacted the former legislation and by many of the same Congressmen who had passed it originally. Section 28 of the Bankruptcy Act gave priority, immediately after administration expenses, to "All debts due to the United States, and all taxes and assessments under the laws thereof", these being ranked ahead of "All debts due to the State in which the proceedings in bankruptcy are pending, and all taxes and assessments made under the laws of such State." Thus, when the Congress of those days wished to prefer the federal government, it knew how to say so.[4] Furthermore, it was not until *United States v. Security Trust & Savs. Bank, infra,* decided in 1950, that Congress could have had any reason to suppose that what it had failed to say with respect to priority in the tax lien legislation of the 1860's would be supplied for it by judicial construction.

With this background, one would think it fairly plain that when a tax lien of the United States encounters a state tax lien of precisely the same nature,

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[4] See also § 5004(a)(1) of the Internal Revenue Code of 1954. This statute, which provides explicitly that the federal lien for taxes on distilled spirits shall be a "first lien" on the property to which it attaches, was first enacted in 1868, 15 Stat. 125. The enactment afforded protection to prior lienors whose liens would thereby be outranked by requiring that waivers of their priority be obtained before a distiller could obtain the performance bond necessary for legal entry into the distilling business. 15 Stat. 128, § 5177(b)(2) of the Internal Revenue Code of 1954.

the case would be governed by the "cardinal rule" laid down by Chief Justice Marshall in *Rankin & Schatzell* v. *Scott*, 12 Wheat. (25 U.S.) 177, 179 (1827):

> The principle is believed to be universal, that a prior lien gives a prior claim, which is entitled to prior satisfaction, out of the subject it binds, unless the lien be intrinsically defective, or be displaced by some act of the party holding it, which shall postpone him in a court of law or equity to a subsequent claimant.

Arguing against this, the Government tells us that "In the collection of its revenue the Federal Government must necessarily have supremacy over the states (and the numerous local tax authorities deriving their power from those states)," since "the Federal Government is not in a position * * * to match the timing of the innumerable state and local tax liabilities." Whatever force such an argument might or might not have with Congressmen, who after all are not without some local allegiances, the Government points to nothing in the language or history of the tax lien statutes to show that Congress entertained the purpose thus attributed to it. Moreover, the change in the priority provisions of the Bankruptcy Act made in 1898, 30 Stat. 563, and continued to this day, § 64, 11 U.S.C. § 104, whereby claims of states and their subdivisions, even when they have not become liens at the critical date, were elevated to the same rank as similar tax claims of the United States, casts doubt on the existence of the policy here claimed.

The Government quite rightly reminds us that, however all this may be, we are not reading from a clean slate but from one that bears copious writing by the Supreme Court. This begins, for present purposes, with *United States* v. *Security Trust & Savs. Bank*, 340 U.S. 47 (1950)—a case in which, as has been

pointed out, the Court was "without benefit of a brief for the respondent."[8] The decision, which established priority of the federal tax lien over that arising from an attachment under a California statute permitting a plaintiff to attach the property of a defendant at any time "as security for the satisfaction of any judgment that may be recovered", is plainly distinguishable from the instant case. Although the attachment had preceded the date of the federal lien, judgment had not, and the Supreme Court of California itself had said that "The attaching creditor obtains only a potential right or a contingent lien • • •", which, depending on the eventualities of his lawsuit, might never come into effect; the rule of "first in time, first in right" surely need not be read so broadly as to permit a state to place someone in the "first" position by resort to the fictional doctrine of "relation back." But Mr. Justice Minton went on to say:

> In cases involving a kindred matter, i.e., the federal priority under Rev. Stat. § 3466, it has never been held sufficient to defeat the federal priority merely to show a lien effective to protect the lienor against others than the Government, but contingent upon taking subsequent steps for enforcing it. [Citing Illinois v. Campbell, *supra.*] If the purpose of the federal tax lien statute to insure prompt and certain collection of taxes due the United States from tax delinquents is to be fulfilled, a similar rule must prevail here.

To us this falls considerably short of saying, as the Government asserts, that the entire body of law holding that certain liens had not reached the level required to raise the question whether they might overcome the priority expressly accorded the United States

[8] Brown, The Supreme Court 1957 Term—Foreword: Process of Law, 72 Harv. L. Rev. 77, 84 n. 37 (1958).

by R.S. § 3466, was transplanted to the Federal tax lien statutes which by their terms accorded none. We read it as saying only that, just as the § 3466 priority could not be overcome by a state's baptizing as a lien something which in fact was "merely a lis pendens notice that a right to perfect a lien exists", 340 U.S. at 50, the rights of the federal government under the tax lien statutes likewise could not be.

That Mr. Justice Minton did not mean to say in *Security Trust* what the Government says he did, was made quite clear four years later in *United States* v. *New Britain*, 347 U.S. 81 (1954). There, in upholding the liens of city real estate taxes and water rents insofar as these had attached before the federal tax assessments, he sharply distinguished the situation where "the debtor is insolvent" and hence "all the property of the debtor is involved," in which case "Congress has expressly given priority to the payment of indebtedness owing the United States * * * by § 3466 of the Revised Statutes" from the situation "where the debtor is not insolvent", in which case "Congress has failed to expressly provide for federal priority, * * * although the United States is free to pursue the whole of the debtor's property wherever situated." *Id.* at 85.* In the latter situation, the Court held, "priority of these statutory liens is de-

* The Court's next sentence, "The State, having a lien only upon property within its boundaries, may not reach beyond the state line to fasten its lien upon other property," may be thought to run exactly counter to the Government's contention, noted above, that the tax collection problems of the United States require a reading of the tax lien statutes that would prefer its liens to similar but earlier state or local tax liens.

termined by another principle of law, namely, 'the first in time is the first in right'." *Ibid.*[1]

Indeed, *New Britain* would unquestionably decide this case in favor of Vermont but for one circumstance, the crucial character of which the Government contends to have been recognized in *New Britain* itself. This is that the city liens for taxes and water rents that were there preferred over the federal tax liens "attached to specific pieces of real property." 347 U.S. at 84. We thus are confronted with the not uncommon question whether, when the Supreme Court

[1] The *New Britain* decision would seem to have definitively rejected one argument, not advanced in this Court, that would sustain the Government's position here. This is the view, taken by Mr. Justice Jackson's concurring opinion in *Security Trust*, 340 U.S. at 51, that the statute which is now § 6323 of the Internal Revenue Code of 1954 and was formerly § 3672 of the 1939 Code, see note 3 *supra*, by protecting the rights of mortgagees, pledgees, purchasers, and judgment creditors whose interests arise even after the federal tax lien where the latter has not been recorded, has the effect of subordinating all lienors who cannot bring themselves within one of those four categories even though their liens arise prior to the federal tax lien. The legislative history and purpose of the statute make the argument quite untenable, as is pointed out by Professor Brown in the comment cited in note 5 *supra*, 72 Harv. L. Rev. at 84–85 & n. 39, and as Mr. Justice Jackson himself, by concurring in the Court's opinion in *New Britain*, apparently later recognized. The argument was heavily pressed upon the Court by the Government in *New Britain*, see its Brief at 6–7, 13, 22–24, and its Reply Brief at 7, but was demolished by Professor Kennedy as counsel for New Britain. See Supplemental Brief for Respondent at 10 n. 16, 11–12, 13–14. The Court's decision in favor of the city's prior liens must be taken to have rejected it, since Mr. Justice Minton's opinion for the Court in *United States* v. *Gilbert Associates, Inc.*, 345 U.S. 361 (1953), makes clear that *New Britain* could not have been considered a "judgment creditor" within the terms of former § 3672, and there was no other way in which the city could bring itself within that section.

has mentioned a factor as one of several leading to a decision, this is to be regarded as critical. Cf. *Larios* v. *Victory Carriers, Inc.*, — F. 2d —, — (2 Cir. 1963). Illumination on that issue here is shed by another portion of the *New Britain* opinion dealing with the city's contention that the specific nature of its liens, as against the general nature of the Government's, gave it priority even for liens attaching *after* the federal tax assessments. The Court rejected this claim on the basis that "the priority of each statutory lien contested here must depend on the time it attached to the property in question and become choate," 347 U.S. at 86, and that the prior federal tax liens, although general, were "choate" as soon as they attached. It would seem that if the general federal tax lien under §§ 6321 and 6322 is thus sufficiently "choate" to prevail over a later specific local tax lien, a general state tax lien under an almost identically worded statute must also be "choate" enough to prime a later and equally general federal tax lien under Chief Justice Marshall's "cardinal rule" of "first in time, first in right", in the absence of contrary direction by Congress. So Judge Parker said in dictum in *United States* v. *Greenville,* 118 F. 2d 963, 966 (4 Cir. 1941), a case cited with apparent approval in *New Britain,* 347 U.S. at 84.

The Government also presses upon us post-*New Britain* decisions of the Supreme Court under the tax lien statutes. Of these, only *United States* v. *Buffalo Savings Bank,* 371 U.S. 228 (1963), concerns rival liens arising from tax assessments of a state or municipality, and it adds nothing relevant to the instant case, since the local liens there, like the city liens held junior in *New Britain,* attached subsequent to the assessment of the federal taxes. *United States* v. *Acri,* 348 U.S. 211 (1955) (attachment lien prior to judgment), and *United States* v. *Liverpool &*

London Ins. Co., 348 U.S. 215 (1955) (garnishment lien prior to judgment), were similar to *Security Trust* and are distinguishable from the instant case on the same basis that it is. In *United States* v. *Scovil*, 348 U.S. 218 (1955), the federal taxes were assessed and had become liens before the landlord's distress warrant issued; only the notice of the federal liens postdated the warrant, and the Court held that the lien created by such a warrant was not a mortgage, pledge, judgment or purchase under § 3672 of the 1939 Code, corresponding to § 6323 of the 1954 Code. See notes 3 and 7, *supra*. In *United States* v. *R. F. Ball Construction Co.*, 355 U.S. 587 (1958), decided *per curiam* by a 5–4 vote, the subcontractor's surety whose claim to priority was denied had rested its case on its alleged status as a mortgagee under § 3672 of the 1939 Code. This was also the claim espoused by the four dissenting Justices, who referred to § 3672 as "the statute here conceded by the parties to be controlling." 355 U.S. at 589–90. We see no reason to suppose that the case stands for anything more than a denial of this claim. But if it were to be read as having also decided that, apart from § 3672, the surety enjoyed no priority on the basis of "first in time, first in right" because its lien was not "choate," or if such a view is thought to have been a factor in the Court's decision that the surety's interest did not come within § 3672, the case can be distinguished here. For such a decision may well have turned on the fact that, as appears from the opinion of the District Court, 140 F. Supp. 60 (W.D. Texas), aff'd, 239 F. 2d 384 (5 Cir. 1956), and the record, the surety's claim, based on an assignment made by the subcontractor in consideration for a performance bond covering a construction job in Texas, was for liabilities incurred on the subcontractor's behalf in connection with a completely different job in Louisville, Kentucky; the bond for

this other job was not executed until nearly nine months after the assignment of funds to become due to the subcontractor on the Texas job, and the liabilities for which the surety was seeking to recover out of these funds had not yet arisen at the time the federal tax liens arose. See 4 Corbin, Contracts (1962 pocket part), at 147, n. 72; *United States* v. *L. R. Foy Construction Co.*, 300 F. 2d 207 (10 Cir. 1962). The distinction would, indeed, be more satisfying if the federal tax assessment had preceded the making of the Louisville contract and not merely the accrual of losses thereunder, but there is nothing to indicate that the Court focused on this point.

There remain[*] a series of mechanics' lien cases, all upholding priority of the federal tax lien and all decided by *per curiam* reversal on petition for certiorari: *United States* v. *Colotta*, 350 U.S. 808 (1955); *United States* v. *White Bear Brewing Co.*, 350 U.S. 1010 (1956); *United States* v. *Vorreiter*, 355 U.S. 15 (1957); and *United States* v. *Hulley*, 358 U.S. 66 (1958). See also *United States* v. *Kings County Iron Works, Inc.*, 224 F. 2d 232 (2 Cir. 1955). The *Vorreiter* case occasions no difficulty since, as appears from the report in 134 Col. 543, 307 P. 2d 475, 476 (1957), the federal tax lien arose, though it was not yet recorded, before the contracts giving rise to the mechanics' liens were made. Neither does the *Hulley* case since, as appears from the Government's petition for certiorari (in which is printed the unreported opinion of the Florida Circuit Court for Pinellas County), the United States tax assessment lists had been received by the District Director, and the federal

[*] We are aware also of *Aguilino* v. *United States*, 363 U.S. 509 (1960); *United States* v. *Durham Lumber Co.*, 363 U.S. 522 (1960); and *Crest Finance Co.* v. *United States*, 368 U.S. 347 (1961), but do not consider them relevant here.

tax liens had thus attached, on December 2, 1952 and January 7, 1954, long before the beginning of the construction work on March 11, 1955. In *Colotta*, the work had been completed before the federal assessment, 224 Miss. 33, 79 So. 2d 474, 475 (1955), but the decision, made on the Government's unopposed petition for certiorari over the dissent of Mr. Justice Douglas, may have turned on the fact that the holders of the mechanics' liens had neither recorded their contracts under § 359 nor filed the *lis pendens* notice provided for by § 380 of the Mississippi Code before the federal lien arose, nor had they taken any steps to enforce their liens by bringing suit and obtaining judgment. In *White Bear*, which drew a dissenting opinion from Mr. Justice Douglas joined by Mr. Justice Harlan, the mechanics' lien, although recorded, likewise had not been reduced to judgment when the federal taxes were assessed. See 227 F. 2d at 361.

Apparently, as suggested by Judge Haynsworth, dissenting in *United States* v. *Bond*, 279 F. 2d 837, 849 (4 Cir.), cert. denied, 364 U.S. 895 (1950),[8] the Supreme Court views a mechanic's lien, even if "duly filed and recorded and presently in the process of being foreclosed," as simply "an interim step in the lienor's progress toward the status of a judgment creditor and the foreclosure of all possible defenses to his claim," and thus as analogous to "the lien product of provisional remedies," such as those in *Security Trust, Acri, and Liverpool & London*. See Mr. Jus-

[8] The actual decision in that case is not relevant to our problem; it held that the portion of *New Britain* upholding the priority of federal tax assessments over subsequently accruing local tax liens was not rendered inapplicable because the taxes were paid by a mortgagee whose mortgage, having priority over the federal taxes by virtue of § 6323 of the Internal Revenue Code (former § 3672), covered such taxes. *Accord, United States* v. *Buffalo Savings Bank*, *supra*, 371 U.S. 228.

tice Douglas' dissent in *White Bear*, 350 U.S. at 1011. Whether or not this is the right explanation of *Colotta* and *White Bear*, and whether or not we might agree with Judge Haynsworth as to the equity of the doctrine in cases where the federal tax assessment, or even the notice thereof, postdates the construction work, see 279 F. 2d at 849 n. 8, we do not regard those decisions as controlling the case of a lien arising from a state or local tax assessment. Although such an assessment does not make the taxing body a "judgment creditor" within § 6323 of the Code, *United States* v. *Gilbert Associates, Inc.*, 345 U.S. 361 (1953), see note 7 *supra*, it goes considerably further along that road than a mechanic's lien, which arises out of a private contractual arrangement and to which the taxpayer may have all sorts of defenses. At least this is true, where, as here, the state or local government is no more required than is the United States to resort to the courts to enforce its due. See note 2 *supra*. As the Supreme Court said in *Bull* v. *United States*, 295 U.S. 247, 260 (1935), "The assessment is given the force of a judgment, and if the amount assessed is not paid when due, administrative officials may seize the debtor's property to satisfy the debt." This distinction seems to us the only way to reconcile the *Colotta* and particularly the *White Bear per curiams*, subordinating a mechanic's lien, earlier and on specific property, to the lien of a federal tax assessment later and general, with the *New Britain* opinion which prefers a local tax lien on specific property to a later general federal tax lien but prefers the latter to a subse-

quent specific local tax lien.[10] Doubtless we shall soon be instructed if we are wrong.[11]

Affirmed.

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[10] A possible argument against reconciliation on this basis is that although New Britain's lien for real estate taxes could be enforced by levy and sale, 1949 Conn. Gen. Stats. § 1853 (1960 C.G.S. § 12–172), its lien for water rents could be enforced only by judical foreclosure. 1949 Conn. Gen. Stats. §§ 758, 1863 (1960 C.G.S. §§ 7–239, 12–181). But the Government's Brief before the Supreme Court took no note of this distinction and, on the contrary, stated that both types of liens could be enforced summarily. P. 9 n. 2, p. 27 n. 13. Although a reference in the Reply Brief indicates that the Government may have become aware of the distinction, p. 5 n. 2, this hardly sufficed to disabuse the Court of the earlier concession (Brief, p. 27 n. 13) that both liens "may be enforced by levy and sale." See also Reply Brief, pp. 12–13.

[11] We recognize that in certain of the post-*New Britain* decisions under the tax lien statutes the Supreme Court has, for one purpose or another, cited cases under R.S. § 3466. See *United States* v. *Acri*, 348 U.S. at 213; *United States* v. *Scovil*, 348 U.S. at 220. But we would think it wrong to take such citations as overcoming the considered statement in *New Britain* as to the distinction between the two statutes.

United States Court of Appeals for the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of May one thousand nine hundred and sixty-three.

Present: Hon. LEONARD P. MOORE, Hon. HENRY J. FRIENDLY, Hon. PAUL R. HAYS, *Circuit Judges.*

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

CUTTING & TRIMMING, INC., CHITTENDEN TRUST COMPANY OF BURLINGTON, ET AL., DEFENDANTS-APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

This cause came on to be heard on the transcript of record from the United States District Court for the District of Vermont, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO, *Clerk.*

United States Court of Appeals, Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the third day of July, one thousand nine hundred and sixty-three.

Present: Hon. LEONARD P. MOORE, Hon. HENRY J. FRIENDLY, Hon. PAUL R. HAYS, *Circuit Judges.*

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

CUTTING & TRIMMING, INC., CHITTENDEN TRUST COMPANY OF BURLINGTON, ET AL., DEFENDANTS-APPELLEES

A motion having been made herein by counsel for the appellant for leave to file the petition for rehearing out of time,

Upon consideration thereof, it is ordered that the said motion be and it hereby is granted.

A. DANIEL FUSARO, *Clerk.*

By VINCENT A. CARLIN, *Chief Deputy Clerk.*

United States Court of Appeals, Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the third day of July, one thousand nine hundred and sixty-three.

Present: Hon. LEONARD P. MOORE, Hon. HENRY J. FRIENDLY, Hon. PAUL R. HAYS, *Circuit Judges.*

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

CUTTING & TRIMMING, INC., CHITTENDEN TRUST COMPANY OF BURLINGTON, ET AL., DEFENDANTS-APPELLEES

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is ordered that said petition be and hereby is denied.

A. DANIEL FUSARO, *Clerk.*

By VINCENT A. CARLIN, *Chief Deputy Clerk.*

APPENDIX B

Internal Revenue Code of 1954:

SEC. 6321. LIEN FOR TAXES.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C. 1958 ed., Sec. 6321.)

SEC. 6322. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time.

(26 U.S.C. 1958 ed., Sec. 6322.)

SEC. 6323. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien without Notice.*—Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate—

* * * * *

(26 U.S.C. 1958 ed., Sec. 6323.)

8 Vermont Statutes Annotated (1958 Rev.) Title 32:

SEC. 5765. AMOUNT OF WITHHELD TAXES AS LIEN AGAINST EMPLOYER.

If any employer required to deduct and withhold a tax under section 5761 of this title neglects or refuses to pay the same after demand, the amount, including interest after such demand, together with any costs that may accrue in addition thereto, shall be a lien in favor of the state of Vermont upon all property and rights to property, whether real or personal, belonging to such employer. Such lien shall arise at the time the assessment and demand is made by the commissioner of taxes and shall continue until the liability for such sum, with interest and costs, is satisfied or becomes unenforceable. Such lien shall be valid as against any subsequent mortgagee, pledgee, purchaser or judgment creditor when notice of such lien and the sum due has been filed by the commissioner of taxes with the clerk of the town or city in which the property subject to the lien is situated, or, in the case of an unorganized town, gore or grant, in the office of the clerk of the county wherein such property is situated. * * *

SEC. 5767. FORECLOSURE OF LIEN.

The lien provided for by section 5765 of this title may be foreclosed in the case of real estate agreeably with the provisions of law relating to foreclosure of mortgages on real estate, and in the case of personal property, agreeably with the provisions of law relating to the foreclosure of chattel mortgages.

U.S. GOVERNMENT PRINTING OFFICE: 1963